Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-761

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION TO ACCELERATE CONSIDERATION AND BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

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November 7, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION TO ACCELERATE CONSIDERATION

Now come petitioners and respectfully move the Court to accelerate consideration of their petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review an order and judgment of that court entered on review of an order of the district court in *United States* v. *American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C.). Specifically, petitioners request the Court: (1) to set an early date for the Government to file its brief in opposition to the petition for writ of certiorari; and, in the event that certiorari is granted, (2) to set an early date for petitioners to file their brief on the merits and for the

Government to file its answering brief on the merits; and (3) to set this case for argument as soon as is convenient for the Court during this Term. In support of this motion, petitioners submit herewith their Brief In Support Of Motion To Accelerate Consideration.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

STATEMENT

The dispute from which the present petition for certiorari arises relates to a new strategy for conducting antitrust litigation and investigations adopted by the Antitrust Division of the United States Department of Justice. This new strategy marks a radical departure from the manner in which the Antitrust Division has conducted its litigation and investigations in the past and from the procedures for the conduct of litigation as set forth in the Federal Rules of Civil Procedure. The order of the district court below represents the first instance in which any court has given

approval to this new strategy, although no less than twelve courts have flatly rejected the new strategy in decisions as to which the Government has not sought appellate review (see petition, pp. 17-18).

The Antitrust Division's new strategy consists of appropriating for use in the conduct of its own litigation and investigations the fruits of the discovery conducted against a target company by private adversaries who have brought their own suits against the target company and have engaged in broad discovery and trial preparation in those cases. The Antitrust Division's frankly admitted purpose in engaging in this process of appropriation is to secure to itself the saving of time—and the consequent advantage over the target company in trial preparation and investigatory resources—which flows from relying on the work product of attorneys for private parties in the preparation of their own cases (see petition, pp. 8-11). The circumstances in which the present dispute arose furnish an ideal factual background for this Court to resolve the extremely serious and important question as to the propriety of the Antitrust Division's new strategy and to do so on an expedited basis.

The Government's efforts to appropriate the fruits of discovery conducted by private litigants in their disputes with a target against which the Government also wishes to proceed have produced a particularly unfair result in the proceeding below. The Government's civil antitrust action against the Bell System—*United States* v. *American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C.)—was filed in 1974. While the Government and the Bell System were endeavoring to resolve their disputes as to discovery from one another,

the district court stayed all discovery in the action *on its own motion* on February 20, 1975, and ordered the parties to submit briefs on the question of the court's antitrust jurisdiction over the allegations of the complaint in view of the regulation of the Bell System's conduct, challenged in the complaint, by the Federal Communications Commission and state regulatory commissions. This stay was continued in effect for all but brief periods until November 28, 1977, while the jurisdictional issues were being briefed and argued, and, during that entire time, no discovery was taken in the action below by the Government against the Bell System or by the Bell System against the Government. (These events are described in greater detail on pages 3-7 of the petition.)

During the time that the jurisdictional issue was being briefed and argued and discovery was stayed in the Government's action below, two private antitrust actions brought against the Bell System—the *MCI* and *Litton* cases*—had proceeded expeditiously under protective orders which limited the use of some or all of the discovery taken in those actions to the preparation and trial of the respective actions in which the discovery was taken. Perceiving an opportunity to seize a massive advantage over petitioners in the preparation for trial of the action below, the Government sought to appropriate the discovery taken from the Bell System by MCI and Litton in their respective actions. The Government sought and obtained from the district court an order—Pretrial Order No. 11—requiring petitioners to turn over to the Government copies of the

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* *MCI Communications Corp., et al.* v. *American Tel. & Tel. Co., et al.*, No. 74 C 633 (N.D. Ill.); *Litton Systems, Inc., et al.* v. *American Tel. & Tel. Co., et al.*, No. 76 Civ. 2512 (S.D.N.Y.).

documents selected from their files in discovery by the attorneys for MCI and Litton. The Government also sought, but was denied for the present, an order of the district court directing petitioners to produce to the Government copies of the transcripts of the depositions of petitioners' officers and employees taken in the *MCI* and *Litton* cases.

The Government also pursued its strategy before the *MCI* district court, convincing that court to modify the protective order in that case to permit the Government to obtain from MCI the documents selected by MCI, the transcripts taken by MCI of petitioners' officers and employees, and analyses and indices of such discovery materials prepared by MCI's attorneys. However, the Government has continued to oppose and delay petitioners' efforts to obtain discovery from the Government, even though a related order entered by the district court—Pretrial Order No. 12—drastically restricts petitioners' ability to prepare for trial. (These circumstances are described in greater detail on pages 7-14 of the petition.)

Petitioners opposed the Government's efforts to secure the fruits of discovery in the *MCI* and *Litton* actions, and the issues were extensively briefed by the Government and petitioners before the district court below, the *MCI* district court, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Seventh Circuit, and before this court. A stay of the effectiveness of the district court's Pretrial Order No. 11 has been continued by Mr. Chief Justice Burger pending further order of the Chief Justice or of this Court, and a stay of the *MCI* district court's order permitting MCI's attorneys to furnish petitioners' documents to the Government and to cooperate with the Govern-

ment in preparing its case against the Bell System has been continued by the Seventh Circuit pending its ruling on the merits of petitioners' appeal from the *MCI* district court's order. (These proceedings are described on pages 15-17 of the petition.)

ARGUMENT

Expedited consideration by this Court of the petition for certiorari and of the merits of petitioners' challenge to the orders below is exceptionally important to the administration of justice in the federal courts and to the parties to this cause. Accelerated consideration would serve the interests of the orderly administration of justice in the federal courts for, in light of the serious issues as to the integrity of protective orders raised by the unprecedented orders of the district court below and of the *MCI* court, it is in the interest of sound judicial administration to resolve those issues as soon as possible, lest litigants begin to assume that protective orders may be undermined and that they must confine the scope of discovery taken against them as narrowly as possible to protect themselves against later loss of protection under those orders (*see* petition, pp. 17-30).

Moreover, both the Government and petitioners have every incentive to brief the questions and to secure a decision from this Court at the earliest possible date. The Government's desire to appropriate the fruits of discovery in *MCI* and *Litton* is currently blocked by the stays of the order of the district court below continued by Mr. Chief Justice Burger and of the order of the *MCI* district court continued by the Seventh Circuit. Petitioners are involved in numerous actions brought against them in which discovery is

proceeding under protective orders like the protective orders in *MCI* and *Litton*. Thus, petitioners have every interest in knowing at the earliest possible moment whether or not they may place confidence in those protective orders, particularly in view of the fact that Pretrial Order No. 11, in combination with Pretrial Order No. 12, threatens to deprive petitioners of their right to prepare and present their defense—a threat which petitioners have every incentive to remove at the earliest possible moment (see petition, pp. 30-36).

Finally, petitioners and the Government are in a position as good as any pair of litigants could be to brief the question in this Court fully and on an accelerated basis. Both parties have repeatedly briefed the issues involved in the petition during proceedings before two district courts and two courts of appeals, thus assuring that the presentation of the issues to this Court will be as full and complete as it ever will be.

In these circumstances the granting of petitioners' motion for expedited consideration would be beneficial to everyone concerned. This Court has granted expedited consideration of proceedings in the past when the interests similarly were served by expedition, as in *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 946, 947 (1967). Petitioners are prepared to meet any schedule which would be convenient for the Court in connection with the disposition of the petition for certiorari and the resolution of the cause on the merits, including early dates for the briefing and argument of the cause.

CONCLUSION

For the foregoing reasons, the Motion to Accelerate should be granted.

Respectfully submitted,

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